No. 11421.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARCEL RODD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

In our opening brief[1] we have contended that in order to support a conviction on the ground of obscenity, it must be established beyond a reasonable doubt that there is a "clear and present danger" that the material in question will impel the average adult reader to anti-social sexual behavior; that CALL HOUSE MADAM is not obscene by this or any other definition; that there was total failure of proof to support the charge in the indictment or that the defendant did "knowingly" and "feloniously" cause the book to be deposited with or to be taken from a common carrier; that the defendant was denied a fair trial in violation of due process; that Count One of the indictment is fatally defective; that the effect of the sen-

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[1]References to our opening brief are hereafter made by means of the letters A. B., followed by page numbers.

tence in the instant case is to punish the defendant twice for the same act; that there was a complete failure of proof on Count Two of the indictment; and that even if the conviction under Count Two were valid, it was error to impose a separate sentence on it. We pointed out that a careful search had not revealed a *single* case in which a defendant had been convicted, as the defendant Rodd has been, for both "sending" and "receiving" by reason of the mere act of depositing books with a common carrier.

The prosecution's brief,[2] for the most part, avoids the fundamental issues raised by these contentions, and concerns itself with drawing unwarranted assumptions and innuendoes from the meager evidence.

POINT I.

"Call House Madam" Cannot Be Declared Obscene as a Matter of Law.

A. To Warrant a Criminal Conviction, the Proof of Obscenity Must Be "Beyond a Reasonable Doubt" and Not "by a Reasonable Judgment" as the Prosecution Contends.

It is axiomatic that a criminal conviction must be on the basis of evidence which proves guilt beyond a reasonable doubt. (*Wilson v. United States,* 232 U. S. 563; Wigmore on Evidence, 3rd Ed., Sec. 2497, and cases cited therein.)

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[2]Reference to the prosecution's brief are hereafter made by means of the letters G. B., followed by page numbers.

The elements of the crime[3] charged here are (a) knowingly; (b) depositing or causing to be deposited for interstate carriage; (c) an obscene book. The prosecution argues by inference that (a) and (b) were proven beyond a reasonable doubt. Yet on (c) it urges[4] a test of only "reasonable judgment." In effect, it insists that even if this Court were to say that the unlawful character of CALL HOUSE MADAM had not been established beyond a reasonable doubt, the conviction below could not be reversed if the Trial Court could have, by a "reasonable judgment" found it obscene. The unsoundness of this position needs no belaboring. It is true that the determination of an administrative agency or the verdict in a civil case (to take two examples) will be given that sort of review. (*Cf. Lilienthal v. United States,* 97 U. S. 237.) But in a criminal case such as the one at bar, where every material element is to be proven beyond a reasonable doubt (Wharton, Criminal Evid., 11th Ed., Sec. 196), that sort of review is impossible.

The more recent Circuit Court opinions will, on analysis, show the "reasonable judgment" test to be fallacious. In *United States v. One Book Entitled Ulysses,* 72 F. (2d) 705 (C. C. A. 2), the Court formed its own opinion and spent almost three pages discussing the book *de novo,* merely referring to the opinion below (5 Fed. Supp. 182) in ten lines summarizing the proceedings at trial. In *Parmelee v. United States,* 113 F. (2d) 729 (C. A. D. C.), the Appeals Court's opinion runs for over eight

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[3]As we show, *infra* Points III and IV, Count Two relating to "taking" from the carrier is not a separate crime in the case at bar.

[4]G. B. 7-8.

pages with a sixteen line summary of the findings of the Trial Court on obscenity in the statement of facts. And these cases were civil libels under the Tariff Act, 19 U. S. C. A., Sec. 1305(a). The principle we urge—that this Court must be satisfied beyond a reasonable doubt of the illegality of CALL HOUSE MADAM—applies *a fortiori* to the review of a criminal conviction.

Indeed, this Court in *McKnight v. United States,* 78 F. (2d) 931 (C. C. A. 9) formed its own opinion on the allegedly scurrilous nature of the post-cards in question before reversing the decision below. That is all we say should be done in the case at bar. And if this Court were to find that no clear and present danger existed that CALL HOUSE MADAM would impel average adults to anti-social sex behavior, it is clear that it is impossible for the Trial Court to have found proof of obscenity beyond a reasonable doubt.

B. NO EXTRINSIC PROOF OF OBSCENITY WAS OFFERED.

The prosecution's sole reliance is on the book itself. Admittedly, the record here is bare of any extrinsic proof of obscenity.[5] If anything, the record is the other way

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[5]The prosecution concedes, as used in Sec. 396, "lewd," and "lascivious" are really synonyms for, and add nothing to, "obscene." But it contends (G. B. 13) that "filthy" adds new meaning since it encompasses "dirty" or "nasty" matter. Assuming for purposes of argument that this is true, "filthy" would mean scatology. The citations in its brief (G. B. 13) bears this out. *United States v. Limehouse,* 285 U. S. 424 involved letters containing foul language, and *Tyomies Publishing Co. v. United States,* 211 Fed. 385 (C. C. A. 6) involved a picture illustrating a book, which picture was the equivalent of the French postcard, or ordinary smut. It cannot be seriously contended that CALL HOUSE MADAM, which contains no illustrations whatever, is "filthy" due to scatology. Therefore the sole question is its alleged obscenity.

[R. 10-12]. As we have pointed out in our opening brief (A. B. 14), there has been no evidence of undesirable social consequences in the field of sexual behavior arising from the reading of the book. It was in general circulation for four years prior to the defendant's conviction. It was openly sold throughout this country by reputable agencies. It has not been shown to have corrupted or depraved any adult readers by impelling them to anti-social sexual acts. Nor has it been established that there is a "clear and present danger" that it will do so. Obscenity is perhaps the only field in the entire body of criminal law where until the recent Supreme Court decisions cited in our main brief (A. B. 12-14; see also heading D, *infra*), no extrinsic proof was required of the prosecution on a vital element of the alleged crime. Even the doctrine of *res ipsa loquitur,* which comes closest to it, is historically only a presumption of culpability in civil cases, which is rebuttable by evidence. This is due in part at least to the fact that proof as to the true cause of the injury is usually accessible to the party against whom the doctrine is invoked and inaccessible to the injured party. (Wigmore on Evidence, 3d Ed., Sec. 2509; Prosser on Torts, 1941, p. 301.)

The prosecution insists that intrinsic evidence is enough —that a mere reading of CALL HOUSE MADAM is enough to convince this Court that the Trial Judge's decision should be affirmed. It argues (G. B. 8) that the Judge below sat as a jury and by inference was as competent to make that intrinsic appraisal as a jury would have been. This is legal fiction, nothing more. The essence of a jury trial, both realistically and historically, is that the jury, being composed of men drawn from the various

segments of the general public (*Commonwealth v. Isenstadt,* 318 Mass. 543, 559), can appraise the probable impact, on the average adult reader, of the material under attack. A judge is not a cross-section of the community; and the waiver of a jury trial cannot make him so.

C. Obscenity May Not Be Determined on the Basis of Isolated Passages.[6]

The prosecution concedes (G. B. 13) that recent Circuit Court decisions require the reading of a book as a whole. This is correct. (*United States v. One Book Called Ulysses,* 72 F. (2d) 705, 707 (C. C. A. 2); *Parmelee v. United States,* 113 F. (2d) 729, 737 (C. A. D.C.).) It pays lip service to the law by urging that this be done (G. B. 15), and then proceeds to indulge in the very practice which the courts have repeatedly condemned. (See Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40.) It plucks isolated passages out of context, and tries to focus attention on them (G. B. 16 *et seq.*). By its own admission it would have been improper for the prosecution to offer the Trial Judge a copy of the book with marked passages. It would be equally improper to give such marked copies to this Court on appeal. We feel confident that this Court will examine Call House Madam without regard to the prosecution's improper finger-pointing. "The problem is to be solved not by counting passages but rather by

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[6]In *Halsey v. New York Society for Suppression of Vice,* 234 N. Y. 1, the Court of Appeals said: "No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio, or even from the Bible. The book, however, must be considered broadly, as a whole."

considering the impressions likely to be created." (*Commonwealth v. Isenstadt, supra,* at p. 549, "Forever Amber.")

D. A Conviction in an Obscenity Case Necessarily Entails the Suppression of the Book in Question, and Involves the Freedom of the Press. The Courts Must Be All the More Vigilant in Requiring Proof Beyond a Reasonable Doubt.

As we have shown (A. B. 12-14), the "clear and present danger" test developed by the United States Supreme Court must be applied in determining whether a book is obscene beyond a reasonable doubt. We have also shown that when the test is applied to Call House Madam, no justification exists for conviction.

The prosecution says this test cannot be applied. Faced with the clear and explicit utterances of the Supreme Court, it puts forward a new theory. It insists that obscenity statutes were intended to dry up the "streams" which, if allowed to accumulate, would back up behind the dam of morality and ultimately breach it. It argues that since Call House Madam deals with sex in its least attractive aspects, it is one of the streams that must be dried up. The prosecution does not pause to inquire whether this is a roaring stream or a bare trickle. Nor is it daunted by the fact that its metaphor is a pure assumption unsupported by anything in the record.

The prosecution's theory flouts reality as well as the law. It ignores the moral stamina of the average adult. It overlooks the myriad sexual stimuli which confront the adult daily in the form of newspapers and magazines, books, plays, motion pictures, paintings, statuary, store

displays, advertising, and, most important, the presence of persons of the other sex. Furthermore, the theory ignores the fact that the Supreme Court in recent years has repeatedly and emphatically struck down every attempt to suppress free speech and press in cases where the attempts were predicated, by implication, on just such stream-and-dam arguments as the prosecution has here advanced.

In order to warrant suppression it is not enough that the material have a "reasonable tendency" to harm. Even a "dangerous tendency" is not sufficient. For, as this Court recognized in *McKnight v. United States,* 78 F. (2d) 931, 932 (C. C. A. 9) this type of offense against the mails (and, by necessary implication, against interstate commerce by carrier) is highly penal. (*Swearingen v. United States,* 161 U. S. 446.) Therefore, since freedom of the press is involved, obscenity must be proven beyond a reasonable doubt: it must be shown that there exists a "clear and present danger" of the occurrence of anti-social sexual behavior unless the book is suppressed. "What finally emerges from the 'clear and present danger' cases is a working principle that the substant of evil must be extremely serious and the degree of imminence extremely high * * *." (*Bridges v. California,* 314 U. S. 252, 263.)

In *Bridges v. California, supra,* the defendants published acrimonious comment on pending litigation. One defendant advised a California Trial Court to send certain persons to jail rather than put them on probation, and threatened adverse criticism in the future if this were not done. In a telegram the other defendant Bridges characterized a Trial Court's decision in a labor dispute

as "outrageous" and said that its enforcement would be met by a strike which would tie up West Coast shipping. The defendants were convicted of contempt of court. The highest court in California affirmed the conviction on the ground that the defendants' utterances had had a "reasonable tendency" to interfere with the orderly administration of justice and to cause a disrespect for the judiciary—words suspiciously reminiscent of the prosecution's stream-and-dam argument here. Were not the diatribes of the appellants in the *Bridges* case "streams" of disrespect which, if swelled by similar streams, would break down the dam of public esteem for the law? Yet the Supreme Court held that no clear and present danger had been shown, and reversed the convictions.

In *Cantwell v. Connecticut,* 310 U. S. 296, the same result was reached. There the defendant had played victrola records attacking the Catholic religion. Persons testified that they had been deeply offended thereby and had felt like striking the defendant. The defendant was convicted of common law breach of the peace. Here, too, there was a "stream" of abuse which, if permitted to multiply and gather behind the dam of restraint, might burst and result in wholesale breaches of the peace. Yet the Supreme Court held that the constitutional guaranty of free speech and religion would not allow the suppression of the defendant's views.

The display of a red flag as a symbol of Soviet Russia and the Communist Party of the United States may well be considered a "stream" in the flow of opposition to our form of government. Yet the Supreme Court, in *Stromberg v. California,* 283 U. S. 359, held that the "stream" could not be dried up. Surely a "malicious, scandalous

and defamatory newspaper" which made grave accusations of laxity against public officers in connection with the prevalence of crime, was a "stream" tending to destroy public faith in law enforcement. Adhering to its clear-cut policy, the Supreme Court nevertheless held that such a newspaper could not be suppressed as a nuisance. (*Near v. Minnesota,* 283 U. S. 697.)

It is unnecessary to multiply examples. Basically the prosecution's theory stems from its belief that CALL HOUSE MADAM is not a good book, possibly even an unpleasant one. However, that does not make it obscene or justify its suppression. As Mr. Justice Holmes said in dissenting in *Abrams v. United States,* 250 U. S. 616, 630:

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out."

There was no showing below that CALL HOUSE MADAM presents a clear and present danger to the morals of the community. It should be exonerated.

POINT II.

The Prosecution's Contention as to the Sufficiency of Count One of the Indictment Ignores the Safeguards Provided by the United States Constitution.

The prosecution argues (G. B. 24) that vital matters of substance are mere procedural questions of jurisdiction and venue, and need not be stated in the indictment nor proven at the trial. It says that the place where the crime charged in Count One was committed need not be alleged; that even if it were required, the defendant waived the defect by going to trial; and that in any case, the defendant can prevent double jeopardy in the future by resorting to parol evidence. This argument flies in the face of the Sixth Amendment to the United States Constitution which requires that a defendant be apprised of the crime of which he is accused. It also runs counter to the double jeopardy provisions of the Fifth Amendment.

A. The Indictment Itself Is Fatally Defective.

The defendant herein was *not* charged with depositing. The indictment accuses him of *causing* the deposit [R. 2]. However, the indictment specifies neither the place of deposit of the books with the carrier, nor the place where the defendant allegedly caused the deposit to be made. It merely charges that the carriage was to be from Brooklyn, New York, to San Diego, California. Assuming that this Court holds that the point of deposit may reasonably be inferred to be the place of the origin of the shipment, *the place where the defendant did the things that caused the deposit* is still nowhere set forth. We maintain this is a fatal defect.

There is still another substantive defect arising from Count One. Since the indictment does not state the place where the defendant did the things that caused the deposit, the proper place of trial cannot be determined. Therefore defendant Rodd cannot be tried for that crime in California merely because the Government arbitrarily decided to try him there. We conceded in our main brief (A. B. 26) that there was no question of venue arising from the transfer of the cause from the Southern Division of California to the Central Division thereof. But there is a substantive defect arising from a trial at a place in which no acts of the defendant took place. It may be that in the ordinary criminal case the question can be waived by going to trial. But we insist that there can be no such waiver in a case involving freedom of the press, since suppression of CALL HOUSE MADAM will result from a conviction. As we have pointed out (*supra,* Point I-D), the Supreme Court has repeatedly recognized that special considerations govern, and a much higher standard of proof is required, in a case in which the First Amendment is involved. Hence no waiver of venue could have any effect in the case at bar where the place of crime is not specified, even though no objection was made prior to trial.

The cases cited in the prosecution's brief are not in point. They are addressed to venue and not to defect of substance. *Hagner v. United States,* 285 U. S. 427 (G. B. 25), concerned primarily the proper place of trial, and therefore it is not relevant. Moreover, the indictment there clearly stated that the fraud letter had been placed in the Post Office in Scranton, Pennsylvania, to be delivered at Washington, D. C. The place of the commission of the crime was specified, and the Supreme

Court merely presumed receipt of the letter from the proper mailing.[7] *Brown v. Elliott,* 225 U. S. 392 (G. B. 26) also involves the question of venue and not the sufficiency of the indictment.

Nor can the defective indictment here be explained by analogy to conspiracy. It is clear in *Brown v. Elliott, supra,* that without an overt act there could have been no conviction for conspiracy to use the mails to defraud. So the place of the overt act not only determined venue but established the substantive criminal act. Since the indictment specified that the overt act took place in Omaha, it was properly held to be sufficient. In the case at bar, however, the indictment does not specify the place where the defendant *caused* the books in question to be deposited, which—in distinction to the place of deposit—was the place of the crime.

The prosecution also argues that indictments simliar to the one *sub judice* have been held sufficient by this Court. This is not so. The indictments in the cases it cites (G. B. 27) did specify to some extent the place of crime. In both *Fiddelke v. United States,* 47 F. (2d) 751 (C. C. A. 9) and *Parmagini v. United States,* 42 F. (2d) 721 (C. C. A. 9), the date and city where the alleged offense took place were indicated; in *United States v. Busch,* 64 F. (2d) 27 (C. C. A. 2), cert. den'd 290 U. S. 627, the indictment stated that the crime was committed "at the Southern District of New York and within the jurisdiction of the Court." In the instant case, not even this

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[7]It is significant that in the *Hagner* case there was no additional count for "taking" the letter from the mails even though the *trial was held at the place where the letter was delivered,* to-wit: Washington, D. C.

much is set forth. Under the indictment as drawn, the defendant could have caused—by mail, telephone, telegraph or word of mouth *in any one of the 48 states*—the deposit with the carrier in Brooklyn. This is not what the Fifth Amendment envisages as protection against double jeopardy.

The defendant did not waive the insufficiency. He moved to dismiss the indictment at the trial [R. 7], and subsequently moved for a new trial [R. 17]. However, the fatal defect, being one of substance, was not subject to waiver in any event (A. B. 28, 29).

B. Nor Was the Defective Indictment Cured by Evidence Produced at the Trial.

As we have shown in our main brief (A. B. 30-31), evidence produced at a trial is not relevant on the legal sufficiency of an indictment. But even if it were, the evidence which was presented in this case did not cure the defective indictment. In the *Fiddelke, Parmagini* and *Busch* cases, *supra,* any uncertainty latent in the indictment was dispelled after trial. In the case at bar the stipulation of July 23, 1946 [R. 8-10] was the only evidence on this point, and it does not mention the place of crime charged in Count One.

The cases cited by the prosecution (G. B. 26) on the role of evidence as to the *means* of causing a deposit to be made in the mails, are not apposite. Both *Graham v. United States,* 120 F. (2d) 543 (C. C. A. 10) and *Smith v. United States,* 61 F. (2d) 681 (C. C. A. 5) involved the question of whether the indictment must specify the particulars of the scheme by which the letters were caused

to be deposited in the mails; in both cases it was properly held that this was evidence to be adduced at trial. Neither case involved the *place* of the crime.

The conviction on Count One should be reversed, and the indictment to that extent dismissed.

POINT III.

A Single Criminal Act Cannot Be Split Into Two Offenses. The Defendant Cannot Be Punished Both as Consignor and Consignee Merely by Virtue of Being Consignor.

The prosecution urges that there were two different crimes, separate and distinct, charged in the two counts. We agree that under the statute Congress intended to create two crimes and two different criminals. But we insist that where a person consigns books to a carrier and does nothing whatever at the point of destination, he cannot be held guilty as consignee. Nor can he be punished twice for the same act without violating the Fifth Amendment. Yet that is precisely what happened to the defendant here.

In an attempt to extricate itself from the dilemma in which it faces, the prosecution has devised a novel contention (G. B. 30). It says that since the defendant was a distributor of CALL HOUSE MADAM, and since the copies of the book had to be conveyed from the printer to the carrier and from the carrier to the bookstore, the defendant was guilty of both depositing and receiving by virtue of the single act of causing to deposit. Presumably this means that a publisher of an indecent book who ordinarily fills his own orders direct without a distributor, is guilty

of only one crime (that of depositing), and that a bookseller who takes the book from a carrier is guilty of only one crime (that of taking). But a distributor who is not responsible either for printing or ultimate distribution to the reading public is, according to the prosecution, twice as guilty. The absurdity of the contention becomes all the more apparent when we realize that most books are sold not through distributors but directly by publishers to booksellers. If Congress had wanted to punish persons trafficking in obscenity twice on the same transaction, the distributor would clearly have been the least effective target.

The cases cited by the prosecution are not in point. Each of them involved two separate crimes requiring different evidence. Possessing liquor and selling it require different proof (*Albrecht v. United States,* 273 U. S. 1 (G. B. 28)), as do forging an endorsement and subsequently uttering it (*Wiley v. United States,* 144 F. (2d) 707 (C. C. A. 9) and *Demaurez v. Squier,* 121 F. (2d) 960 (C. C. A. 9), cert. den'd 314 U. S. 661 (G. B. 29)); breaking into a post office and stealing stamps from it (*Morgan v. Devine,* 237 U. S. 632 (G. B. 29)); agreeing to take a bribe and subsequently receiving part of it (*Burton v. United States,* 202 U. S. 344 (G. B. 29)); counterfeiting gas ration coupons and having the counterfeit coupons in one's possession (*Carney v. United States,* C. C. A. No. 11,001 (C. C. A. 9) (G. B. 29)); and making a counterfeit plate for $10 Federal Reserve notes and having the plate in one's possession (*Michener v. United States,* ..... U. S. ....., 91 L. Ed. 1213 (G. B. 29)).

We repeat, "depositing" a book with a carrier is a quite separate crime from "taking" it from the carrier at the

end of the shipment. Indeed the United States Supreme Court in *United States v. Johnson,* 323 U. S. 273, stated that as to the mails the crime of the sender is complete when he deposits the letter in the mail. As we pointed out in our opening brief (A. B. Point V), the implication is clear that Congress intended to punish two different persons for two different offenses.

The prosecution's brief does not cite a single case where the same person was convicted of both crimes by virtue of the single act of depositing. Indeed, two of the cited cases would, if the prosecution's position had any substance, have resulted in conviction on two crimes instead of only one. In *United States v. Kenofskey,* 243 U. S. 440 (G. B. 31), it was held that a person could be convicted of "causing" a fraud letter to be deposited in the mails if he knew and expected it to be so deposited by an innocent party. The defendant was *not* convicted of "causing" the letter to be taken from the mails at its destination. The reason is not hard to find. The prosecution knew that, as a matter of law, it could not be done. In *United States v. Guest,* 74 F. (2d) 930 (C. C. A. 2) (G. B. 29) the Court held that a defendant who had caused a letter, deposited in Pennsylvania, "to be sent and delivered by the post office" to himself in New York with intent to defraud, was guilty of a crime in New York; yet the defendant was *not* accused of both "causing to be deposited" and "taking" from the mail, as he would have had to be under the prosecution's theory in the case at bar. So the *obiter dicta* of the *Guest* case, *supra,* cited (G. B. 30) to the effect that there may be three crimes committed by the *one* act, must be qualified by the corollary implicit in the case that only one conviction may be had and only *one* punishment imposed on any *one* crime

In our main brief we have conceded (A. B. 42) that under certain circumstances, separate offenses might be charged and proved under this statute. But that does not solve the question here. The defendant did nothing to "cause" the book "to be taken" in San Diego. The question is what was actually done rather than what might have been done. As Judge Faris, speaking for the Court in *Cain v. United States,* 19 F. (2d) 472 (C. C. A. 8) stated at page 474:

> "The trouble is not with the law but with the facts. This possibility of a violation of either statute by wholly different acts is readily demonstrable. Many of the cases seem to make the latter possibility the test which saves the situation from double jeopardy. We think, however, it is a question of what was actually done rather than a question of what might have been done. Defendant concededly might have made a sale of morphine without sending such morphine through the mail, or he might have sent morphine through the mail, or shipped it by express or by freight, and thus have been guilty on the second count, without making a sale."

In the instant case the prosecution *might* have proved that the defendant, in person or through an agent, or by any other separate and independent act subsequent to the deposit, actually did cause the books to be taken from the carrier in San Diego. If this had been done, two separate offenses might have been proved. But what actually *was* done was to try to prove two alleged crimes by the same evidence.

> "The Fifth Amendment to the Constitution protects all against double punishment for the same offense. Its enforcement and its application demand a test

> which is a practical, not a theoretical, one. It is the evidence, and not the theory, of the pleader, to which we must look to determine this issue. And it is needless to add that one accused of crime, regardless of kind or magnitude of the offense, is entitled to the protection of this section of the Constitution." (*Murphy v. United States,* 285 Fed. 801, 817 (C. C. A. 7), cert. den. 261 U. S. 617.)

If it were held that the identical evidence could be used, the Fifth Amendment would be violated. If it were held that additional evidence was required of "causing to be taken," Count Two would have to be dismissed for complete failure of proof.

POINT IV.

The Evidence Does Not Support the Conviction Under Count Two.

The prosecution argues (G. B. 32) that "it does not matter that the same proof is offered to sustain two separate crimes," and that "the true test is whether the two crimes require different proof." Even the prosecution realizes that this is double-talk, it concedes that the argument "may seem paradoxical." Just because the defendant "hoped and expected" that the shipment would be taken from the carrier at destination, says the prosecution, he "caused" it to be so taken.

It is easy enough to surmise why the prosecution advances its paradoxical argument. It has to do so in order to lend a semblance of support to the conviction under Count Two. The thesis is a novel one. It says, in essence, that evidence on one crime may be borrowed to support conviction on a totally different crime. That the

prosecution has seen fit to resort to this thesis is an inferential admission that there *is* no evidence here on Count Two. Of this there can be no doubt. There is not a scintilla of proof that the defendant took the books or caused them to be taken from the carrier at destination.

United States v. Kenofskey, supra, cited by the prosecution (G. B. 32) is not in point. There the Court held that the defendant need not deposit a letter himself but might be guilty of causing the deposit if he gives the letter to someone who he knows will deposit it. This is emphatically not a holding that delivery by a carrier, which normally follows a deposit, is the equivalent of a taking from the carrier without any additional act on the part of the defendant after the carriage ends.

POINT V.

The Court Below Imposed Separate Sentences on Each Count. If Count Two Is Not Sustained, the Sentence Based on It Must be Reversed.

There is no ambiguity here as to the sentences that were imposed by the Trial Court. There were two *separate* sentences on the two counts [R. 17-18, 19, 20, 22-23, 51].

The prosecution asserts that since the Court could have given the defendant a fine and a suspended jail sentence on either count, the fact that Count Two may be bad is immaterial; and that the two sentences must in any event stand.

We submit the prosecution is in error. A consideration of the types of sentence which may be imposed by a Trial Court will make this clear. There are three types.

The first is a general or blanket or consolidated sentence which is not broken down into separate punishment for each count on which the defendant is found guilty. Two of the cases cited by the prosecution (G. B. 33) are of this type: *Abrams v. United States,* 250 U. S. 616 and *Whitfield v. Ohio,* 297 U. S. 431. Since a general sentence cannot exceed the maximum punishment which may be meted out on one count, a trial court imposing it in effect ignores the number of counts on which the defendant has been convicted. This type of sentence "conforms precisely to the facts; and on writ of error the presumption necessary to sustain it—namely that there was only one offense—is the exact truth." (*Bishop, New Criminal Procedure,* 2d Ed., Sec. 1329.)

The second type of sentence is a separate sentence on each count where the sentences are to run concurrently. *Hirabayashi v. United States,* 320 U. S. 81 (G. B. 33) involved sentences that ran concurrently on each of two counts; it was therefore unnecessary for the Court to reverse the judgment even if one count was bad, since precisely the same sentence would remain.

The third type of sentence presents a wholly different situation. It occurs where a separate sentence is imposed on each count and the sentences either run *consecutively* or are *different* on different counts. Here the trial court is obviously influenced by the several offenses embodied in the various counts, and metes out punishment according to the *number* of crimes.

It is the *third* type of sentence which is now appealed. The Trial Court felt that two distinct crimes had been committed. He therefore imposed a separate sentence on each. To argue that the Judge might have imposed the

same penalties on the defendant even if he had been convicted of only one crime, is to indulge in speculation and to deprive the defendant of due process.

United States v. Weiss, 150 F. (2d) 17 (C. C. A. 2), cert. den. 326 U. S. 736 (G. B. 33-34) is not in point, as it involved a "technical" mistake.

Our contention is supported by this Court's decision in *Barnes v. United States,* 142 F. (2d) 648 (C. C. A. 9). There the defendants were found guilty on four counts. The maximum penalty for each count was a fine of $10,000, three years imprisonment, or both. The Trial Court imposed a fine of $50 on each count. This Court reversed the conviction on Count Two on the ground that since Counts One and Two charged one offense, it was error to impose separate sentences.

This Court had previously ruled substantially the same way in *Dimenza v. Johnston,* 130 F. (2d) 465, rehearing den. 131 F. (2d) 47 (C. C. A. 9). The defendant in that case was convicted on five counts: one for robbery of a bank by force, three for the robbery but by means of a dangerous weapon which put three different persons in jeopardy of their lives, and a fifth for conspiracy to commit the crime. He was sentenced to consecutive jail terms of five years each on the first four counts, and two years on the fifth count—a total of 22 years. On a writ of *habeas corpus* this Court agreed with the defendant's contention that only one offense, that charged in the second count, had been committed, and that only the con-

viction on that count could be sustained. The applicable statute allowed a 25-year sentence on the crime charged in that count. On the theory now advanced by the prosecution the aggregate of 22 years should have been upheld, since the defendant was guilty on a count on which 25 years could have been given. This Court emphatically rejected this theory, and since the defendant had served more than 5 years, ordered him discharged.

Assume that John Doe is convicted on ten counts of a crime. The maximum punishment for each count is ten years. He is sentenced to one year on each count, the sentences to run consecutively. Nine counts are reversed on appeal. Does the aggregate sentence of ten years still stand? The prosecution insists (G. B. 33) that it does. Both logic and the law dictate a contrary conclusion.[8] For if the prosecution were correct, the vast majority of criminal appeals on multiple convictions would be a mockery.

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[8]This is implicit in the decision in *United States v. Busch, supra,* cited by the prosecution (G. B. 27). There the Trial Judge though urged by the prosecution not to do so, insisted on imposing consecutive sentences on each of three counts even though he could have given the aggregate upon either one of the first two counts. On appeal the defendant claimed, as defendant Rodd does, that the first two counts did not charge separate crimes. On the theory advanced in the case *sub judice* (G. B. 33) the Court should have said that it was irrelevant since the total punishment could have been imposed on the remaining good count. But the Court did not do this; it very carefully examined each of the crimes and found them to be separate in fact and therefore affirmed the judgment of conviction. The inescapable inference is that if they were not separate crimes the sentence on the bad counts would have to be reversed.

It is unnecessary to multiply hypotheses. If the Judge below had wished, he could have imposed a "general" sentence on both counts. He did not do so. It cannot be assumed that this was unintentional[9] If Count Two falls, the separate sentence given on it must fall with it.

Conclusion.

In our main brief (pp. 13-14) we said that under recent Supreme Court cases the basic question in an obscenity case is whether there actually exists grave and immediate peril that grownups of average sex instincts and intelligence will, on reading the material under attack, be driven to commit anti-social sexual acts. We further said that the record here was bare of any proof justifying a conviction under the clear-and-present-danger rule. The prosecution in its brief has failed to meet this point. CALL HOUSE MADAM is not obscene as a matter of law. The conviction on both counts should therefore be reversed.

In any event judgment must be reversed since Count One of the indictment is fatally defective, and since on Count Two there was either a total failure of proof, or an unconstitutional punishment twice for the same act. To repeat, we have not been able to find a single case

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[9]If anything, it must assumed to have been intentional. The Trial Judge commented on the spotless record of the defendant and his company, and the fact that a great percentage of the books he had published were on "a high moral plane" [R. 48]. The Judge may well have borne in mind the possibility of appeal, and the legal consequence of a reversal on one count. There is no reason to suppose that he desired to deprive the defendant of the benefits of such a reversal.

where the defendant, having performed a single isolated act, was punished for two. The prosecution's brief fails to bring forward any such case. If the conviction on both counts is held valid, the sentence on Count Two should be set aside since the same facts were offered to prove both counts.

Finally, judgment should be reversed because no felonious intent on the part of the defendant was proved, and he did not receive a fair trial.

Respectfully submitted,

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